

[HIGH COURT OF AUSTRALIA.]

EX PARTE THE CARPATHIA TIN MINING COMPANY
LIMITED.

H. C. OF A. *Income Tax—Assessment—Alteration of assessment—Power of Federal Commissioner of Taxation—Mandamus—Income Tax Assessment Act 1915-1918 (No. 34 of 1915—No. 18 of 1918), sec. 33.*

SYDNEY,

Nov. 19;
Dec. 2.Rich J.
In Chambers.

Dec. 18.

Knox C.J.,
Isaacs and
Starke JJ.

Held, by Rich J., that the High Court will not, by mandamus or process of a like nature, compel the Federal Commissioner of Taxation to exercise the power given him by sec. 33 (1) of the *Income Tax Assessment Act 1915-1918* to make alterations in or additions to any assessment, where he does not think that such alterations or additions are necessary in order to insure the completeness and accuracy of the assessment.

APPLICATION for order nisi.

This was an application by the Carpathia Tin Mining Co. Ltd. for on order nisi calling upon the Federal Commissioner of Taxation to show cause why a writ of mandamus, or relief of a like nature to mandamus, should not be issued by the High Court directing the Commissioner to make certain alterations in the assessments of the applicant for Federal income tax for the years 1917-1918 to 1924-1925, inclusive, in order to insure the completeness and accuracy of such assessments. The application was first heard by Rich J. in Chambers.

P. R. Higgins, in support of the application, referred to sec. 33 of the *Income Tax Assessment Act 1915-1918*; *Julius v. Bishop of Oxford* (1).

[Rich J. referred to *Pasmore v. Oswaldtwistle Urban District Council* (2).]

Jud. adv. vult.

RICH J. delivered the following written judgment :—This is an application for an order calling on the Commissioner of Taxation to show cause why a writ of mandamus, or relief of the like nature to mandamus, should not be issued to the Commissioner directing him to make certain alterations in the assessments of tax served on the Company for the years 1917-1918 to 1924-1925, inclusive, in order to insure the completeness and accuracy of such assessments.

In November 1919 an application was made to the Commissioner on behalf of the Company, in respect of the 1918-1919 return, for certain deductions under sec. 20 (i) of the *Income Tax Assessment Act* 1915-1918 to be made in the assessment for that year. Similar applications were made in subsequent years. The Commissioner allowed a partial deduction but disallowed the main deduction. No objection was lodged on behalf of the Company under the provisions of sec. 37 of the above Act. The present application is based on the provisions of sec. 33 of the Act (now sec. 37 of the *Income Tax Assessment Act* 1922). The section reads thus :—“(1.) The Commissioner may at any time make all such alterations in or additions to any assessment as he thinks necessary in order to insure its completeness and accuracy, notwithstanding that income tax may have been paid in respect of income included in the assessment: Provided that every alteration or addition which has the effect of imposing any fresh liability, or increasing any existing liability, shall be notified to the taxpayer affected, and, unless made with his consent, shall be subject to objection. (2.) When any alteration in an assessment has the effect of reducing the taxpayer's liability the Commissioner may refund the taxpayer any tax overpaid: Provided that where the alteration in the assessment is due to an application by the taxpayer no refund shall be given if the application has not been made within three years after the payment of the tax.”

The question is one of great importance in income tax law.

Assuming the sums in question to be in the nature of a foregift, in my opinion there is no power in a taxpayer to compel the Commissioner to act under sub-sec. 1 of sec. 33. The Commissioner “may” at any time make alterations or additions to an assessment, but the sub-section limits them to “such alterations in or additions to any assessment as he thinks necessary in order to insure its completeness

H. C. OF A.
1924.

EX PARTE
CARPATHIA
TIN MINING
CO. LTD.

Dec. 2.

H. C. OF A.
1924.

EX PARTE
CARPATHIA
TIN MINING
CO. LTD.

Rich J.

and accuracy.” No one else’s opinion on this subject can be substituted for that of the Commissioner, but, if he forms that opinion, he “may,” and therefore, as I think, is bound to, make the proper alteration or addition. There are two qualifications on his discretion prescribed by the two provisoes to the sub-section, but it is to be noted that there is no other or further power of alteration or addition given by the section than is found in sub-sec. 1 with its provisoes.

When we come to sub-sec. 2 we find, not an additional power of making an alteration or addition in an assessment, but an enactment as to what is to happen in certain cases, assuming an “alteration” (not an addition) has been validly made by virtue of the preceding sub-section. That alteration may have been made by the Commissioner either on his own discovery of an error or on an application by the taxpayer. Sub-sec. 2 then provides for what is to follow in certain cases, but there is nothing in sub-sec. 2 which can afford the taxpayer any ground for cutting down the condition in sub-sec. 1 contained in the words “as he thinks necessary” &c.

This construction keeps sec. 33 (now sec. 37) in harmony with other sections of the Act regarding assessment and objections—e.g., secs. 37, 38 (now secs. 50, 51), where a specific remedy is provided (cf. *Pasmore v. Oswaldtwistle Urban District Council* (1)).

For these reasons I refuse the application.

Application refused.

Dec. 18.

The same application was made to the Full Court (*Knox C.J., Isaacs and Starke JJ.*).

P. R. Higgins, in support of the application.

PER CURIAM. The application will be refused.

Application refused.

Solicitors, *Turner, Nolan & Bender.*

B. L.